No. 3198

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT

THE CITY OF SALEM, a Municipal Corporation,
WALTER E. KEYES, its Mayor, and
C. O. RICE, its Treasurer,
PLAINTIFFS IN ERROR,

vs.

SALEM WATER, LIGHT & POWER COMPANY,
a Corporation,
DEFENDANT IN ERROR.

BRIEF OF DEFENDANT IN ERROR

Upon Writ of Error to the District Court of the United States for the District of Oregon

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SALEM WATER, LIGHT & POWER COMPANY,
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Defendant in Error.

Brief of Defendant in Error Upon Writ of Error
to the District Court of the United States
for the District of Oregon.

NAMES AND ADDRESSES OF ATTORNEYS OF RECORD:

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STATEMENT OF FACTS

The facts upon which the questions here involved arise, appear sufficiently from the record and need, in our judgment, no restatement.

The parties have been designated as they appeared in the lower court.

ARGUMENT

This action was brought by the Salem Water, Light & Power Company to recover for fire hydrant service admittedly furnished by it to the defendant municipality. The amount sued for is based upon a hydrant charge fixed by order of the Public Service Commission of Oregon, promulgated in August, 1914, rather than upon the lower maximum rate fixed in the franchise of 1891.

The ultimate question is whether or not the State of Oregon, through its Public Service Commission, had power to increase the rates to be paid by the city for fire hydrant service over those fixed in the franchise granted the utility by the city. The legality only of the Commission's action is questioned, not its correctness upon the facts submitted to the Commission.

The theory of the defense, as we understand it, is this:

1. By virtue of the grant and acceptance of the franchise ordinance, a contract between the city and the utility arose, the impairment of whose obliga-

tions by the state is inhibited by both the federal and state constitutions.

2. That the Public Utility Act of 1911 (1911 Laws of Oregon, Chapter 279) and the orders of the Commission under it are void insofar as they purport to do away with the right of the city to fire hydrant service at a rate not exceeding the maximum fixed in the franchise, because the power to fix such rates is irrevocably withdrawn from the legislature and vested in the city by virtue of the adoption of the Home Rule Amendment.

3. That the rate for the fire hydrant service to the city, though unreasonable and discriminatory in the sense that it was not adequate for the service rendered, was a matter beyond the jurisdiction of the Public Service Commission, discrimination in favor of the state or its political subdivisions being contrary neither to the common law nor to the provisions of the Public Utility Act.

4. That the Public Utility Act was prospective only in its operation.

These will be considered seriatim.

IMPAIRMENT OF OBLIGATIONS OF A CONTRACT.

Assuming that the franchise ordinance, when accepted, created a contractual relation, can the city, *as against the state,* set up the constitutional guaranties protecting the obligations of a contract?

The City of Salem might undoubtedly have been given authority to negotiate a franchise agreement with a public utility, which, *so far as the utility's rights thereunder were concerned,* would have been conclusive for a reasonable period of time even upon the state.

> "It has been settled by this court that the state may authorize one of its municipal corporations to establish by an inviolable contract the rates to be charged by a public service corporation or natural person for a definite term not grossly unreasonable in point of time, and that the effect of such a contract is to suspend during the life of the contract the governmental power of fixing and regulating the rates. * * * But, for the very reason that such a contract has the effect of extinguishing pro tanto an undoubted power of government, both its existence and the authority to make it must clearly and unmistakably appear and all doubts must be resolved in favor of the continuance of the power."
>
> Home Telephone and Telegraph Co. vs. City of Los Angeles, 211 U. S. 265; 29 Sup. Ct. Rep. 50, 52.

The grant of the power to thus preclude even the state from the exercise of its inherent sovereign right to regulate rates must be clear and unmistakable.

"The surrender by contract of a power of government, though in certain well defined cases it may be made by legislative authority, is a very grave act, and the surrender itself, as well as the authority to make it, must be closely scrutinized. No other body than the supreme legislature (in this case the legislature of the state) has the authority to make such a surrender unless the authority is clearly delegated to it by the supreme legislature. The general powers of a municipality or of any other political subdivision of the state are not sufficient. Specific authority for that purpose is required."

Home Telephone and Telegraph Company vs. City of Los Angeles, 211 U. S. 265; 29 Sup. Ct. Rep. 50, 52.

Milwaukee Electric Railway & Light Co. vs. Railroad Commission of Wisconsin, 238 U. S. 174; 35 Sup. Ct. Rep. 820, 822.

Portland Railway, Light & Power Co. vs. City of Portland, 201 Fed. 119, 125.

Woodburn vs. Public Service Commission, 82 Ore. 114, 123; L. R. A. 1917 C. 98; Ann. Cas. 1917 E. 996.

City of Portland vs. Public Service Commission (Oregon, 1918), 173 Pac. 1178, 1180, 1181.

State vs. Billings Gas Co. (Mont., 1918), 173 Pac. 799, 801.

The first question, therefore, is whether or not at the time of the enactment of the ordinance granting the franchise to plaintiff's predecessor in interest, the City of Salem had been authorized by the legislative assembly to surrender by contract the state's right to regulate rates.

The City of Salem was incorporated by a special act of the legislature, approved by the Governor October 15, 1862 (1862 Special Laws of Oregon, 3). At the time of the enactment of Ordinance No. 207, the franchise ordinance here in question, the charter of the City of Salem (1891 Laws, 1088, 1089) contained the following pertinent provisions:

> "Sec. 6. The mayor and aldermen shall comprise the common council of said city, and at any meeting shall have exclusive power: * * *
>
> "6. To provide for lighting the streets and furnishing the city and the inhabitants thereof with gas or other lights, and with pure and wholesome water, and for such purposes may construct such water, gas or other works, within or without the city limits, as may be necessary or convenient therefor; provided, that the council may grant and allow the use of the streets and alleys of the city to any person, company or corporation who may desire to establish works for supplying the city and the inhabitants thereof with such water or light upon such terms and conditions as the council may prescribe.

"26. To permit, allow and regulate the laying down of tracks, street cars and other railroads upon such streets as the council may designate, and upon such terms and conditions as the council may prescribe; to allow and regulate the erection and maintenance of poles or poles and wires for telegraph, telephone, electric light or other purposes, upon or over the streets, alleys or public grounds of the city; to permit and regulate the use of the streets, alleys and public grounds of the city for laying down and repairing gas and water mains, for building and repairing sewers and the erection of gas or other lights [sic]; to preserve the streets, alleys, side and crosswalks, bridges and public grounds from injury, and prevent the unlawful use of the same, and to regulate their use; to fix the maximum rate of wharfage, rates for gas or other lights, for carrying passengers on street railways, and water rates."

These are, so far as we have been able to ascertain, the only portions of the charter under which it is or plausibly may be claimed that the City of Salem had power to fix the rates to be charged for water for a definite period of time in advance, other than the usual provisions in charters granting authority to contract and to be contracted with, and to sue and be sued. They, we submit, do not authorize the City of Salem by contract to surrender an inherent and highly esteemed power of government, that of

the exercise of the police power to protect the public safety, public health and public morals of its citizens, and especially does this language amount to no such sweeping grant of authority when it is construed with the strictness required by the authorities above quoted, and usual in the interpretation of all municipal charters.

Some of the decided cases will enforce the contention. In the case of Home Telephone and Telegraph Company vs. Los Angeles, 211 U. S. 265; 29 Sup. Ct. Rep. 50, the facts appear to have been as follows:

The City of Los Angeles had granted to one King, the plaintiff's assignor, a franchise to construct and operate a telephone system within the city for a period of fifty years. This franchise was granted by the city acting in accordance with the statute requiring all applications for franchises to be filed with the governing body of the municipality; that advertisement of that fact be then made, describing the character of the franchise to be granted and stating that the franchise would be sold to the highest bidder. This statute also provided that the franchise should be sold to the highest bidder, and that a bond should be given by the purchaser to secure the performance of every term and condition thereof. King was the successful bidder for the particular franchise in question and the franchise as drawn fixed maximum rates for service.

At the time of the enactment of the ordinance granting the franchise and at the time of the enactment of a subsequent ordinance attempting to regulate the rates to be charged by the plaintiff telephone company, the charter of the City of Los Angeles contained the following provision:

> "The council shall have power by ordinance * * * to regulate telephone service and the use of telephones within the city and to fix and determine the charges for telephones and telephone service and connections, and to prohibit or regulate the erection of poles for telegraph, telephone or electric wire in the public grounds, streets or alleys, and the placing of wire thereon * * *."

Under this charter provision it was assumed by the District Court and by the Supreme Court, and agreed between parties to the suit, that the City Council had the power to prescribe charges for telephone service, and further that such power is legislative in its character, continuing in its nature, and capable of being vested in a municipal corporation.

The telephone company took the position, however, that the city had by contract authorized the telephone company to maintain its charges for service at a specified standard and that the subsequent ordinance passed to reduce the rates was, therefore, a law impairing the obligation of an existing contract, contrary to Section 10 of Article I of the Federal Constitution. It also contended that the statute

relative to advertising for bids, etc., impliedly granted the right to contract as to rates for a definite period of time, precluding any subsequent regulation of rates during that period.

The Supreme Court, speaking through Mr. Justice Moody, after an exhaustive examination and discussion of the cases, unanimously determined that, under this charter provision, the City of Los Angeles was not authorized to surrender by contract its power to regulate rates and that, therefore, the appellant's contention that there was an inhibited impairment of the obligation of its contract would have to be denied. The opinion in this cause is exhaustive and valuable because of its comment on prior decisions.

In San Francisco-Oakland Terminal Railways vs. City of Alameda, 226 Fed. 889, the public utility brought a suit to have annulled a municipal ordinance reducing the fares to be charged school children by the plaintiff for transportation furnished. The ground upon which annulment was sought was the alleged impairment of the obligations of the franchise held by the plaintiff. After a consideration of the statutory authority granted the city by its charter, the court decided that the charter did authorize the city to regulate rates but not to barter away its police power, the court saying at page 891:

> "It is apparent that these provisions, especially those of the Civil Code and the charter, while undoubtedly conferring power upon the

> city to regulate rates, are wholly wanting in any expression either directly or by implication indicating a purpose on the part of the legislature to authorize a municipality to restrict or barter away the power there given."

There are several cases which the defendants have and which often are cited as authorities for a liberal construction of the language of the alleged grant of power to surrender temporarily the power to regulate rates. These, however, are all cases where there had been either an express delegation by the legislature to the municipality of power to barter away for the time being the power to regulate rates, or a subsequent legislative ratification. Thus, speaking of Los Angeles vs. Los Angeles City Water Company, 177 U. S. 558; Detroit vs. Detroit Citizens' Street Ry. Co., 184 U. S. 368, 22 Sup. Ct. Rep. 410; Cleveland vs. Cleveland City R. Co., 194 U. S. 517; Cleveland vs. Cleveland Electric Ry. Co., 201 U. S. 529, and Vicksburg vs. Vicksburg Water Works Co., 206 U. S. 496, Mr. Justice Moody, in delivering the unanimous opinion of the court in Home Telephone and Telegraph Company vs. Los Angeles, *supra*, said:

> "The decisions of this court, upon which the appellant relies, where a contract of this kind was found and enforced, all show unmistakably legislative authority to enter into the contract."

It is submitted on this branch of the case that

the language of the charter quoted by us, as well as the language thereof relied upon by the defendants, is not sufficient to constitute an unmistakable or indeed even an apparent grant of power by the state to the City of Salem to bargain away for the time being the rate regulating power of the sovereign state.

But, even if this power was never granted in the first instance, the defendants contend that the legislature subsequently ratified the act of the city in granting the franchise in question. This ratification they attempt to find in Chapter 80 of the Laws of 1911, the pertinent portions of which read as follows:

> "Sec. 1. That any incorporated city or town within the State of Oregon owning, controlling or operating a system of water works * * * for supplying water * * * for its inhabitants and for general municipal purposes, and any person, persons or corporation controlling or operating any water system * * * under contract, lease or private ownership, shall have the right and are hereby authorized and empowered to sell, supply and dispose of water * * * from such system to any person, persons or corporation within or without the limits of such incorporated city or town in which such water * * * system is operated, and to make contracts in reference to the sale and disposal of water * * * from such sys-

tem for use within or without the corporate limits.

"Sec. 2. All contracts or agreements heretofore made and now in effect for the sale and disposal of water * * * *by* incorporated cities and towns, and by any person, persons or corporations operating, controlling, or owning water * * * systems to any person, persons or corporation within or without the limits of such incorporated city or town in which such system is operated, are hereby ratified and declared legal and valid contracts insofar as the right of such city or town to contract with reference to same is concerned."

At first glance this Act would seem pertinent; but a perusal thereof will show that the real occasion for its enactment was either the authorization or the ratification of contracts by cities and towns to supply water to persons living without the limits of the municipality. By Sec. 3229 of Lord's Oregon Laws, cities and towns were authorized "to provide for lighting the streets and furnishing such city or town *and the inhabitants thereof* with gas or other lights, and with pure and wholesome water"; but no power was granted to furnish light or water to persons living beyond the corporate limits, that is, to persons who were not "inhabitants" of the city or town. The same limitation upon the power to provide water will be found in the charter of the City of Salem as it existed in 1891. By that charter

the Mayor and Aldermen were given exclusive power, *inter alia,* "to provide for lighting the streets and furnishing the *city* and the *inhabitants thereof* with gas or other light and with pure and wholesome water."

1891 Laws of Oregon, pp. 1088, 1089.

Inasmuch as the practice had grown up of furnishing water to people resident without the corporate limits, this Act—the Act found in Chapter 80 of the Laws of 1911—was passed to enable cities and towns owning a municipal light or water plant to furnish water to such persons living in close proximity to but beyond the limits of the municipality. Section 2 of the Act ratifies all contracts for the sale and disposal of water or electricity *by* incorporated cities and towns and not contracts for the sale and disposal of water and electricity *to* incorporated cities and towns. We submit that the construction placed upon this Act by defendant's counsel is strained and wholly unwarranted.

But, having now discussed the question of initial authority and subsequent ratification, a perusal of the franchise itself seems appropriate. Such an examination will disclose that the grant is made in Section 1; that the condition and stipulation upon which the grant is made is set out in Section 2, that condition being the furnishing of water free of charge to certain fountains and buildings. Section 3 contains regulatory provisions as to pressure and quality of water, size of mains, etc.

Section 4, the one here involved, reads thus:

> "The said Salem Water Company, their successors or assigns, shall not charge, at any time, higher rates for water than is customarily allowed for water, in towns or cities of like population on the Pacific Coast; but the Salem Water Company, its successors or assigns, shall not at any time, charge more than one dollar and eighty-two cents ($1.82) per month for each hydrant or cistern actually supplied. And the right is hereby reserved by the City of Salem to continue or discontinue, to connect or disconnect any or all hydrants or cisterns connected or which may hereafter be connected with said works; and the City of Salem shall not pay for said hydrants or cisterns, while the same are disconnetced or discontinued."

Plaintiff submits that this fourth section is not even an attempt by the city to bargain away any rate making power of the state or of itself. The provision was inserted by the city simply to mark the maximum rate chargeable by the utility and was inserted in the exercise of the legislative power to fix maximum rates rather than of the power to contract. Consequently, plaintiff contends that the state, in no event, has been precluded from changing the rates, first, because the city had no power to preclude the state, and secondly, because the city has not attempted so to preclude the state.

But, assuming for the purposes of this argument

that the franchise when accepted constituted a contract between the city and the utility, could its impairment by subsequent state action be successfully objected to *by the city?* It may be admitted that franchises are at times contracts whose obligations cannot be impaired without the utility's consent. Indeed, Ordinance No. 207 expressly so stipulates. But the rule is otherwise where the state and the utility consent, and the city alone objects.

> "Municipal corporations are political subdivisions of the state, created as convenient agencies for exercising such of the governmental powers of the state as may be intrusted to them. For the purpose of executing these powers properly and efficiently they usually are given the power to acquire, hold, and manage personal and real property. The number, nature, and duration of the powers conferred upon these corporations and the territory over which they shall be exercised rests in the absolute discretion of the state. Neither their charters, nor any law conferring governmental powers, or vesting in them property to be used for governmental purposes, or authorizing them to hold or manage such property, or exempting them from taxation upon it, constitutes a contract with the state within the meaning of the Federal Constitution. The state, therefore, at its pleasure, may modify or withdraw all such powers, may take without compensation such property, hold it itself, or vest it in other

agencies, expand or contract the territorial area, unite the whole or a part of it with another municipality, repeal the charter and destroy the corporation. All this may be done, conditionally or unconditionally, with or without the consent of the citizens, or even against their protest. In all these respects the state is supreme, and its legislative body, conforming its action to the state constitution, may do as it will, unrestrained by any provision of the Constitution of the United States."

Hunter vs. Pittsburg, 207 U. S. 161; 28 Sup. Ct. Rep. 40, 46.

Worcester vs. Worcester Consolidated Street Railway Co., 196 U. S. 539; 25 Sup. Ct. Rep. 327, 329.

Portland, etc., R. R. Co. vs. Portland, 14 Ore. 188, 193.

Simon vs. Northrup, 27 Ore. 487, 502.

Portland vs. Public Service Commission (Ore. 1918), 173 Pac. 1178, 1181.

As the Supreme Court of Oregon recently said in rendering its opinion in the so-called "Six Cent Fare Case"—a case of wide public interest and elaborate argument:

"The state, acting by and in the name of its agent, the city, made an agreement with the company. It later created the Public Service Commission, giving it general authority over

all such and kindred matters everywhere in Oregon, except as stated. By this legislation there came into existence a new representative of the state, endowed by it with plenary power, and to which the other party to the so-called agreement applied for a modification thereof. After investigation and deliberation, which may be likened to negotiations between contracting parties, the state, by its agent, the Commission, has consented to a change in the contract, allowing the company to charge an increased rate of fare. Whatever might be said if one of the parties to the contract, without the consent of the other, should attempt to change it, whether by legislation impairing the obligation of the contract or otherwise, it does not apply to the present situation, for, as stated, the contracting parties have themselves agreed to the change."

Portland vs. Public Service Commission (Ore. 1918), 173 Pac. 1178, 1181.

To meet this legal difficulty, the defendants say that, while this doctrine is sound when applied to rights held by a municipality in its governmental capacity, it does not apply to rights held by a city in its private or proprietary capacity, and that the right to get hydrant service at not to exceed the franchise rate was held by the City of Salem in its proprietary capacity.

In answer to these contentions, plaintiff submits

two suggestions. In the first place, if the franchise is to be viewed as an ordinary contract between private individuals, then surely the rates are subject to regulation by the state in the exercise of its police power.

> "If the franchise is deemed to be a contract between the city and telephone company, then the mere fact that it was made prior to the enactment of the public utility statute and before the state attempted to regulate the rates, does not debar the state from increasing the rates fixed in the contract between the parties, for the reason that the law wrote into it a stipulation by the city that the state could, at any time, exercise its police power and change the rates; and therefore, when the state does exercise its police power, it does not work an impairment of any obligation of the contract."

Woodburn vs. Public Service Commission, 82 Ore. 114, 121.

Benwood vs. Public Service Commission (W. Va. 1914), 83 S. E. 295.

In the second place, the rights affected were not held by the city for itself, as is, we think, sufficiently shown by the opinion of the Federal Supreme Court in the analogous case of Worcester vs. Worcester Consolidated Street Railway Co., 196 U. S. 539, 25 Sup. Ct. Rep. 327. The facts there were as follows:

In 1891 the Railway Company had been granted a franchise to lay tracks in the streets of the City of Worcester on condition that block paving be laid and maintained between the rails and for a distance of eighteen inches outside the rails, for the entire distance covered by the tracks. This franchise was duly accepted by the company.

At the time the franchise was negotiated, the City Council was empowered to grant locations for the laying of a railroad "under such restrictions as they deemed the interests of the public may require." State legislation also required that paving of streets occupied by their tracks should be kept in repair by street car companies.

In 1898 the legislature passed an Act purporting to relieve street railway companies of the obligation to keep the paving between their tracks in repair. Thereupon the defendant company refused to further repair the paving between its tracks and the plaintiff city made the necessary repairs and strove to hold the street railway company liable for its cost. The city contended that the subsequent legislation purporting to relieve the street railway company from all obligation to keep the paving in repair was invalid because its effect was to impair the obligations of the contract between the city and the railway company—a case, as Your Honors will observe, directly between the grantor and the grantee of the franchise in question, and therefore pertinent here, despite the distinction attempted to be drawn by defendants.

The Supreme Court said:

"The question then arising is whether the legislature, in the exercise of its general legislative power, could abrogate the provisions of the contract between the city and the railroad company with the assent of the latter, and provide another and different method for the paving and repairing of the streets through which the tracks of the railroad company were laid under the permit of their extended location. We have no doubt that the legislature of the commonwealth had that power. A municipal corporation is simply a political subdivision of the state, and exists by virtue of the exercise of the power of the state through its legislative department. The legislature could at any time terminate the existence of the corporation itself, and provide other and different means for the government of the district comprised within the limits of the former city. The city is the creature of the state. * * *

"In general it may be conceded that it (the municipal corporation) can own private property, not of a public or governmental nature, and that such property may be entitled, as is said, 'to constitutional protection.' Property which is held by these corporations upon conditions or terms contained in a grant, and for a special use, may not be diverted by the legislature. * * *

"It seems, however, plain to us that the asserted right to demand the continuance of the obligation to pave and repair the streets, as contained in the orders or decrees of the board of aldermen granting to the defendant the right to extend the locations of its tracks on the conditions named, does not amount to property held by the corporation, which the legislature is unable to touch, either by way of limitation or extinguishment. If these restrictions or conditions are to be regarded as a contract, we think the legislature would have the same right to terminate it, with the consent of the railroad company, that the city itself would have. These restrictions and conditions were of a public nature, imposed as a means of collecting from the railroad company part, or possibly the whole, of the expenses of paving or repaving the streets in which the tracks were laid, and that method of collection did not become an absolute property right in favor of the city, as against the right of the legislature to alter or abolish it, or substitute some other method with the consent of the company, even though as to the company itself there might be a contract not alterable except with its consent. If this contention of the city were held valid, it would very largely diminish the right of the legislature to deal with its creature in public matters, in a manner which the legislature might regard as for the public welfare."

In the light of the foregoing decisions, our position has been and is that, if the city held any rights by virtue of the franchise, they were held either in its proprietary capacity, in which case they were subject to the police power of the state, despite the constitution's inhibition against the impairment of contract obligations, or in its governmental capacity, in which case the state as principal might waive them without the city's consent. The defendants cannot take both horns of the dilemma, they cannot at once claim the powers of the government and the immunities of a private citizen.

It should be noted that the numerous decisions cited by plaintiffs in error signally fail to support the proposition, essential to maintain their defense in this action, that an agreement with a public service corporation on behalf of the public and for its benefit cannot be modified by the supreme public authority, with the consent of the public service corporation, over the objection of the subordinate public agency which acted on behalf of the company in making the original agreement. Many of the decisions cited recognize the subordinate character of the city's authority in the premises, so clearly and cogently stated by Judge Harris in the Woodburn case, 82 Ore. 114, 128:

> "It may be assumed that the franchise was valid and binding upon both parties until such time as the state chose to speak, but the city entered into the contract subject to the reserved right of the state to employ its police power and

compel a change of rates, and when the state did speak the municipal power gave way to the sovereign power of the state."

Thus, in City of Belfast vs. Belfast W. Co. (Me.), 98 Atl. Rep. 738, the court says:

> "The state gave the authority. We are not called upon to consider now whether the state has reserved authority to regulate and control the terms and conditions of service. The state has not yet undertaken to do it in this case."

In State ex rel. vs. Peninsula T. Co. (Fla.), 75 Southern 201, the court says:

> "It does not appear that the railroad commissions have exercised their 'power to regulate by reasonable rules the terms of telephone service contracts between telephone companies and their patrons.' Nor does it appear that the defendant telephone company has filed with the commission schedules showing its rates for telephone service."

Similarly, most of the other cases cited arise upon attempts on the part of the city, without intervention of the state or its express authority, to modify its own contracts. In New York Telephone Company vs. Siegel Cooper Co., 202 N. Y. 511; 96 N. E. 109, the court expressly recognizes that the rate claimed is valid "in the absence of legislation."

The few cases in which the authority of the State

Commission to modify rates has been denied usually turn upon particular provisions of constitution or statute whereby the state has in fact expressly exercised its authority in such a way as to withdraw any power in the premises from its commission. Thus, in Superior vs. Douglas County Telephone Company, 141 Wis. 363; 122 N. W. 1023, the law creating the Railroad Commission expressly saved the existing rate contracts.

In Quinby vs. Public Service Commission, 223 N. Y. 244; 119 N. E. 433, the court holds that the Public Service Commission has general jurisdiction over the subject matter but that in the particular instance its rights were foreclosed by the constitutional provision which in effect based authority to make rates upon the consent of the local authority, including the owners of the abutting property.

In State ex rel. vs. Public Service Commission (Wash.), 172 Pac. 890, the language of the legislative act expressly forbade any increase above the five cent fare.

In Public Service Electric Co. vs. Board of Public Utility Commissioners, 88 N. J. L. 603, 96 Atl. 1013, the court merely held that the Utility Act was prospective only and that the board had no power to require acts to be done by injunction or specific performance.

We believe that the overwhelming weight of such authority as bears directly upon the question here, and especially of the later and carefully considered cases in the United States Supreme Court,

supports the position of the plaintiff and sustains its right to collect the rates fixed by the authorized arm of the state.

It should, perhaps, also be added, in view of the argument made by the appellants at pages 48 and 87 of their brief, that in 1911, when the Public Utility Act was enacted, Section 2 of Article XI did not contain the provision that "all laws passed pursuant to this section may be altered, amended or repealed, but not so as to impair or destroy any vested corporate rights." This section, so far as here pertinent, was effective as of December 8, 1910, in the very form set out at page 15 of appellants' brief.

HOME RULE AMENDMENT.

The second position taken by the defendants is that the state has, by special legislative charter, conferred upon the defendant municipality the power to regulate rates, and that subsequently, upon the adoption of the Home Rule Amendment to the constitution (Art. XI, Sec. 2), that grant became irrevocable, because the charter was no longer subject to amendment by the state.

It may be admitted that for a time the Supreme Court was much at a loss to determine the nature and extent of the state's power over the charters of cities and towns. And for a time it looked as if an *imperium in imperio* had been created.

It is, however, now well settled that the legis-

lature of the state may pass general laws affecting the charters of cities and towns.

> "The legislature has the right to pass a general law concerning municipalities, cities and towns; the right is contained in the Constitution; and therefore when the legal voters of a city or town enact or amend a charter they do so subject to the right of the legislature to pass a general law because their right to enact or amend their charter must be exercised 'subject to the Constitution.'"
>
> Rose vs. Port of Portland, 82 Ore. 541, 568.

> "A painstaking investigation by every member of the court confirms our belief in the correctness of the conclusion that the legislature can enact general laws concerning cities and towns and other municipalities. A construction of the Constitution which enables the legislature to pass a general law relating to cities and towns harmonizes the different sections and makes the organic law consistent with itself."
>
> Rose vs. Port of Portland, 82 Ore. 541, 571.
> Portland vs. Public Service Commission (Ore. 1918), 173 Pac. 1178, 1181.
> Colby vs. Medford, 85 Ore. 485, 534.
> Barber vs. Johnson, 86 Ore. 390, 393.

These decisions seriously limit the doctrine of Kalich vs. Knapp, 73 Ore. 558, cited by defendant on page 89 of his brief.

An additional fact worthy of consideration in this connection is this, viz., that rate making is not a matter of purely local or municipal character.

> "The power to regulate rates does not appertain to the government of a city; it is not municipal in character."
>
> Woodburn vs. Public Service Commission, 82 Ore. 114, 126.

> "Now, the right to regulate rates of public service corporations is a governmental power vested in the state in its sovereign capacity. It may be exercised by the state directly or through a commission appointed by it, or it may delegate such power to a municipality. But I do not understand that a municipality may assume to itself such power without the consent of the state where there is a general law on the subject emanating from the entire state. It is true that under the Oregon system the legal voters of every city or town are given power to enact and amend their municipal charter, subject to the Constitution and criminal laws of the state. But this does not authorize the people of a city to amend its charter so as to confer upon the municipality powers beyond what are purely municipal or inconsistent with a general law of the state constitutionally enacted. Straw v. Harris, 54 Or. 424, 103 Pac. 777, and Kiernan v. Portland,

57 Or. 454, 111 Pac. 379, 112 Pac. 402, 37 L. R. A. (N. S.) 339. It was so held by the Supreme Court of the state in Riggs v. City of Grants Pass, 134 Pac. 776, where a city attempted to amend its charter so as to authorize its council to incur an indebtedness for the building of railroads. The regulation of fares to be charged by public service corporations is not primarily a municipal matter, but is a sovereign right belonging to the state in its sovereign capacity."

Portland Railway, Light & Power Co. vs. City of Portland, 210 Fed. 667, 672.

City of Portland vs. Public Service Com. (Ore. 1918), 173 Pac. 1178, 1181.

In the light of these authorities, it is settled, in our opinion, that the Public Utility Act is not in conflict with Section 2 of Article XI of the State Constitution, first, because the legislature still can, by general law, amend the charters of cities and towns, and secondly, because rate regulation is not a matter primarily of local or municipal concern.

DISCRIMINATION IN FAVOR OF STATE.

If, however, the defense that the franchise ordinance is a contract, the obligations of which may not be impaired by state legislation, or that the Public Utility Act is void as in conflict with the Home Rule Amendment, be not sustained by this court, the defendants take the further stand that the Public Service Commission had no power to

determine the reasonableness of the rate paid by the city for its fire hydrant service, because a discrimination in rate in favor of the state, or a political subdivision thereof, was not illegal either at common law or under our Public Utility Act.

Discriminations in favor of the state and its political subdivisions were not illegal at common law in the sense that they subjected the utility to any penal consequences. Such discriminations are, moreover, the subject of special provision in Section 63 of our own Public Utility Act. (1911 Laws of Oregon, page 502.)

We wish, however, to call the particular attention of the court to the fact that we are not in any way contesting the right of the city to the free service reserved in its franchise. The order of the Public Service Commission, leaving intact these stipulations of the franchise while correcting the hydrant rates, strongly supports the contention hereinbefore urged that the free service and other provisions made in the first section of the franchise are the only terms and conditions of it and that the hydrant rates subsequently mentioned are merely fixed like any other rates, without even a pretense of the exercise of contractual right. We may add that there is, moreover, nothing before the court from which it can deduce that the hydrant rate fixed by the franchise is a "reduced rate" in the sense that it is lower than that afforded to other customers for like service, which is undoubtedly the meaning of the provision in the Public Utility Act relating

to reduced rates to municipalities. There is nothing before the court from which it can infer that the hydrant rate fixed by the Commission was not so fixed in view of a change in the physical or material facts arising since the original rate was fixed which justifies the changed rates, and indeed we think that such would be the presumption in support of the Commission's action if such support should be required. We call particular attention here to paragraph 17 of the finding of the Commission set forth on page 70 of the Transcript of Record of the plaintiffs in error.

But in what position does the defendant city find itself in urging this want of jurisdiction? It appears in the pleadings that the City of Salem, through its properly constituted authorities, filed a petition with the Public Service Commission making complaint both of the service furnished and rates charged by the plaintiff utility. While the proceedings initiated by the filing of this complaint were pending, upon suggestion of members of the Public Service Commission (Paragraph VII of the amended answer). Resolution No. 1294 was adopted by the City of Salem, with the result that thereupon the Public Service Commission, upon a hearing had and with notice to all parties concerned, proceeded to fix the rates to be charged by public utility to various private consumers in the City of Salem, and also to increase the rates to be charged to and paid by the city for hydrant service. Of the order made by the Public Service Commission

in this hearing, no court review was sought by the City of Salem, nor by plaintiff.

Defendants' counsel seek to escape the effect of this order of the Public Service Commission by arguing the question of whether or not Resolution No. 1294 could possibly have the effect of amending Ordinance No. 207. This question, it seems to us, is not before the court. If Ordinance No. 207 has been changed, or any rights created thereby in favor of the City of Salem have been lost, it is rather by virtue of action taken on the part of the City of Salem in the proceeding before the Public Service Commission, and the consequent order entered by that tribunal. Ultimately, the question is one of power on the part of the Public Service Commission to hear and determine the question of the reasonableness of the rate charged by the plaintiff utility for hydrant service furnished the defendant city.

In our judgment, it will not be necessary to attempt a nice definition of the jurisdiction of the Public Service Commission as established by Chapter 279 of the Laws of 1911. It is sufficient to say that the State of Oregon, through its legislative assembly, has decided that it was expedient for the state to assume the burden of regulating rates charged by public utilities to consumers within the state, and to that end it established a commission, whose procedure and powers were thought peculiarly adapted to the ascertainment of what service was reasonably adequate, and what rates were rea-

sonably fair, not only as between a particular consumer and the utility but also with relation to all other consumers within that territory.

It is sufficient for our purposes to know that the Public Service Commission is the tribunal within this state to which to submit the question of the reasonableness of rates charged for service rendered by any utility within the state.

The City of Salem, recognizing the jurisdiction of this tribunal, did submit to it the question of the reasonableness of the rate charged the city for hydrant service furnished by the plaintiff, and a decision has been had thereon, and it seems to us now too late for the city to question the authority of the tribunal selected by it to hear and determine the question submitted. That tribunal had jurisdiction to hear matters of the very sort here submitted, and the rights of the City of Salem under its franchise, whether held in its proprietary or governmental capacity, were by it voluntarily submitted to the Commission for action. This plaintiff has now for a long time furnished service to private consumers at the rate fixed by the Public Service Commission, and those rates were by the Commission itself placed at a lower figure than they would have been had the Commission not increased the rates to be paid by the City of Salem for the service here in question. (Transcript of Record, pages 70-71.)

Resolution No. 1294 does not even purport to amend Ordinance No. 207, and we do not contend that it does. What we do contend is, that there is

nothing in the charter of the City of Salem requiring it to act by ordinance when it is desired to submit to the Public Service Commission the reasonableness of the rates paid by it for hydrant service; that the city, therefore, did legally submit the question of the reasonableness of these rates to the Commission; and that the latter, having by statute jurisdiction over the plaintiff utility and by consent over the city, had power to hear and determine the question submitted.

Perhaps a word should be said about Section 63 of the Public Utility Act and its provisions as to free service to the state and political subdivisions thereof. As we read this Act, the legislature had one ultimate purpose in mind, namely, the procurement of adequate and uniform service to all consumers of the same class, and at fair and equitable rates equal among all consumers of the same class. To that end the legislature established the Public Service Commission, giving it certain administrative and inquisitorial powers necessary, or at least desirable, for the convenient and ready establishment and maintenance of such uniform service at equal rates to all. Incidentally the legislature also incorporated into the Act certain penal provisions enforceable, not by the Commission, but by the courts of general jurisdiction of the state, and Section 63 of the Act is simply one of those penal sections. By its terms, it exempts from the penal features of the Act the practice of giving service free of charge, or at reduced rates, to the state or

political subdivisions thereof. But we do not believe that this court will hold that Section 63 is in effect a ratification of the contract for hydrant service at reduced rates. All that Section 63 means is that the plaintiff utility was guilty of no infraction of the penal provisions of Section 63 of the Public Utility Act by continuing to furnish hydrant service to the City of Salem at a reduced rate. This section does not mean, in our judgment, that the Public Service Commission has no power to hear and determine the reasonableness of rates charged for service rendered to the state or its political subdivisions, if such consumer voluntarily submits the reasonableness thereof to the Commission. Consequently, we believe that the attack upon the jurisdiction of the Public Service Commission fails.

PUBLIC UTILITY ACT PROSPECTIVE ONLY.

Finally, it is urged by the defendants that the Public Utility Act is purely prospective in its operation and that therefore its enactment did not authorize interference by the Public Service Commission with the franchise rates as fixed long prior to the adoption of the Public Utility Act.

Upon this point we content ourselves with calling this court's attention to what was said in a case decided in July, 1918, by the Supreme Court of Oregon. It was there said:

> "Finally, the complaint urges that the order of the Commission is void because the

Public Utility Act is not retroactive. This contention may be dismissed with the statement that the law does and is designed to deal with conditions as they arise, and to adjust matters relating to concerns serving the public, from time to time as may be required."

Portland vs. Public Service Commission (Ore. 1918), 173 Pac. 1178, 1181.

Woodburn vs. Public Service Commission, 82 Ore. 114.

In each of these cases the order of the Commission affected rates established prior to the enactment of the Public Utility Act and in each of them this identical point was made and overruled by the Supreme Court.

In conclusion we submit that the plaintiff is justified in insisting upon the payment by the City of Salem of the fire hydrant charges fixed by the Public Service Commission. The order fixing these increased rates was the result of an investigation of their reasonableness by the Commission, initiated by the City of Salem, whose representatives were heard upon all matters which they desired to submit. No attempt has ever been made by the City of Salem to directly attack this order, though a statutory method for so doing was available. None of the objections now interposed were urged by the city when it initiated its proceedings against the utility. The utility, therefore, was compelled by the statute to come be-

fore the Public Service Commission and to abide by its orders, and it seems to us an act of bad faith upon the part of the city now to set up these technical and, it seems to us, legally unsupportable grounds, in an effort to evade what we may properly term a fair and equitable charge imposed upon the city by the very tribunal selected by it to sit in judgment upon the very question now in litigation.

Respectfully submitted.

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